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No. 91-1420

In The
Supreme Court of the United States
October Term, 1991

JOAN GROWE, SECRETARY OF STATE OF THE STATE OF MINNESOTA, ET AL.,
Appellants,

vs.

JAMES EMISON, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This appeal involves federalism issues arising from the conflict between a federal court action for legislative and congressional redistricting in Minnesota, which involved claims of malapportionment and Voting Rights Act violations, and a competing state court action, which involved only claims of malapportionment.

The underlying federal action is a consolidation of two separate cases involving numerous parties.[1] A three-judge panel of the United States District Court was formed on April 8, 1991, pursuant to 28 U.S.C. § 2284(a) (1988), in response to the first action brought March 18, 1991, by plaintiffs below, appellees here, James Emison, Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo, individually and on behalf of all citizens and voters of the state of Minnesota similarly situated ("the Emison appellees"). The Emison appellees' complaint alleged that existing state legislative and congressional districts violated the Fourteenth Amendment of the United States Constitution and that the existing scheme of legislative districts violated Voting Rights Act § 2, 42 U.S.C. § 1973 (1988). The Emison appellees' complaint requested the adoption of new state legislative and congressional districts that meet constitutional and other legal requirements. The complaint also requested the

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[1]Appellants are the Minnesota Secretary of State, named defendant below, and several intervening parties below, including the majority caucuses of the Minnesota legislature, the Hennepin County Auditor, and several private citizens.

Appellees comprise two groups of private citizens and Appellee Mark Lundgren, Carver County Auditor, named in the consolidated federal action as a defendant individually and on behalf of all county auditors in the state of Minnesota.

adoption of new state legislative and congressional districts that, inter alia, maximize minority voting strength, in the event that the Minnesota legislature failed to do so. See generally Emison v. Growe, 4-91-202, Amended Complaint (D. Minn., March 29, 1991) ("Emison Complaint"), A-73-91[2].

The second federal action was filed on August 9, 1991, by plaintiffs below, appellees here, Duane Benson, Terry Dempsey, Dolores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth ("the Benson appellees").[3] The Benson appellees sought review of a legislative redistricting plan passed by the legislature on virtually a party-line vote at the end of the legislative session in May 1991. That plan was vetoed by the Governor but was codified as Minnesota Laws 1991, Chapter 246, as a result of litigation that determined the Governor's veto to be invalid on procedural grounds. The Benson appellees sought to have Chapter 246 declared unconstitutional and argued that it could not be considered as "state policy" by the federal court. The Benson appellees also sought appropriate ancillary relief, including

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[2]References to the Appendices and Record in this action are denoted as follows:

Appendix to Jurisdictional Statement	A-#
Appellees' Supplemental Appendix	SA-#
Joint Appendix	JA-#
Appendix to Brief of Appellants	ABA-#
Appendix to Brief of Appellees ("Emison-Benson Appendix")	EBA-#
Record (Docket Number of Document in Federal District Court's File)	R-#

[3]The Emison and Benson appellees are citizens from various geographical areas of Minnesota, and include Caucasian, Native American, Asian-Pacific, African-American, and Hispanic voters.

an expedited issuance of a constitutionally acceptable plan. See generally Benson v. Growe, 4-91-603, First Amended Complaint (D. Minn., Aug. 9, 1991) ("Benson Complaint"), SA-63. The Benson appellees' action was consolidated with the Emison appellees' action.

Appellants have accused variously the federal court and appellees of acting under "pretexts." See Brief of Appellants at 29; Appellants' Response to Appellees' Motion to Dismiss at 12 n.12. The only pretexts involved here were those under which the competing state court action was structured and those under which appellants Minnesota Secretary of State and Hennepin County Auditor, present only as election officials, assumed strictly partisan roles in their participation in both the state and federal actions.

The state court redistricting action was commenced on January 24, 1991, when the 1991 session of the Minnesota legislature was less than three weeks old and before the census data necessary for redistricting were available. See generally Cotlow v. Growe, C8-91-985, Complaint (Minn.D.Ct., Jan. 24, 1991), A-174. It was manifest that the action was premature and that no case or controversy existed when the case was filed. The original parties to that action were a group of private citizens as plaintiffs and the Minnesota Secretary of State and Hennepin County Auditor as defendants. The federal court subsequently found that all of these parties represented or were aligned with the interests of the same political party. See Emison v. Growe, 782 F. Supp. 427, 430 n.9 (D. Minn. 1992).

The wholly non-adversarial nature of the state redistricting action is demonstrated by a written stipulation entered into by the original parties on February 25, 1991, by which the parties stipulated that a case or controversy existed, that the state court had jurisdiction, that the plaintiffs had standing, and that the

existing districts were unconstitutional. The parties in fact stipulated to substantive resolution of all legal claims short of final relief. See Cotlow v. Growe, MX 91-001562, Stipulation (Minn. D. Ct., Feb. 25, 1991), A-192-195. In entering into the stipulation, the parties were well aware of the continuing nature of the 1982 federal court redistricting orders in LaComb v. Growe, 541 F. Supp. 145 (1982), and LaComb v. Growe, 541 F. Supp. 160 (1982), since the Minnesota Secretary of State and the Hennepin County Auditor were both defendants in the 1982 federal actions and two of the three named LaComb plaintiffs were plaintiffs in the 1991 state court action, represented by the same counsel who had represented them in the 1982 federal actions.

As further evidence of the non-adversarial nature of the original parties to the state action, the Court should note that they in fact agreed also on final relief, uniformly supporting the same redistricting plans and uniformly taking the same position on every motion in both the state and federal actions.

A state court redistricting panel was constituted on June 4, 1991, approximately two months after the federal panel was formed. See A-196-197. The original parties to the state action allowed intervention without objection by the majority caucuses of the Minnesota legislature, which represented the same political interests as all other parties to the action. See Emison, 782 F. Supp. at 430 n.9. However, plaintiffs in the state action continued to oppose intervention by parties representing other political interests until the initial pre-trial conference before the state court on July 26, 1991. See Cotlow v. Growe, MX 91-001562, Pretrial Order No. 1 (Minn. Spec. Redis. Panel, July 29, 1991), A-198-201.

The state court proceeding included none of the plaintiffs present in the federal action. Although the federal court did, as noted above, recognize that common political interests were

represented in the two proceedings, the Benson appellees were neither involved in the state action nor represented by counsel who appeared in those proceedings.

The federal action also presented legal claims not pled in the state action. The state court pleadings contained no Voting Rights Act claim, and plaintiff-intervenors in that case consistently argued against the state court's jurisdiction to consider such claims. See Cotlow v. Growe, C8-91-985, Memorandum of Plaintiff-Intervenors Regarding Exclusive Federal Jurisdiction Over Voting Rights Act Claims (Minn. Spec. Redis. Panel, Oct. 7, 1991), SA-107. In addition, the pleadings in the state court did not challenge the constitutionality of Chapter 246.

Following the initial pretrial conference before the three-judge federal court on July 22, 1991, appellant legislature specifically moved the federal court to defer, first, to a scheduled session of the state legislature in January 1992, and, second, to the state court proceedings. On August 21, 1991, the federal court issued a unanimous Memorandum Opinion and Order concluding that applicable law required both the state and federal courts to defer to and provide the legislature with an adequate opportunity to effect redistricting in its scheduled January 1992 session. See Emison v. Growe, 4-91-202, Memorandum Opinion and Order (D. Minn., Aug. 21, 1991) (hereinafter "August 21 Order"), A-106.[4]

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[4]At the time of the motions, the state legislature was scheduled to reconvene in January 1992, specifically to address redistricting. In fact, appellant legislature specifically asked the federal court to defer to the legislature, and represented that it would pass, and the Governor would sign or his veto would be overridden, valid plans for both legislative and congressional redistricting. See Emison, 782 F. Supp. at 431-32; August 21 Order, A-109. Yet, one week later, at a hearing before the state panel on August 29, 1991, a "majority of the parties" to the state action, which included the legislature, "requested that the panel accelerate the date for completion of the legislative redistricting process . . . ." See Cotlow v.

In doing so, however, the federal court stated that it would retain jurisdiction both to address any subsequent redistricting plan in light of the voting rights claims before it and to avoid the delay that would occur from the likely appeal of any state court action following the January 1992 legislative session.[5] See id., A-112-118. The federal court stated that it would appoint special masters to assist in developing contingent plans of redistricting in the event that the legislative process failed to produce valid plans by January 20, 1992. See id., A-117. It thereby denied appellant legislature's motion to abstain. In light of the court's determination regarding deference to legislative process, Emison appellees' motion to stay the state court proceeding was also denied. Id.

Chapter 246, the plan challenged by the Benson appellees, was found to be unconstitutional by the state court sua sponte on October 1, 1991. See Cotlow v. Growe, C8-91-985, Pretrial Order No. 4 (Minn. Spec. Redis. Panel, Oct. 1, 1991), A-218-220, A-225. The state court held that Chapter 246 was unconstitutional under both the state and federal constitutions because of numerous defects, including noncontiguous districts and violations of equal representation principles of the Fourteenth Amendment. See id., A-219-220. Nevertheless, without waiting for the legislature to

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Growe, C8-91-985, Pretrial Order No. 3 (Minn. Spec. Redis. Panel, Sept. 13, 1991), A-211.

[5]The federal court properly recognized that the state court would also have to defer to the legislative process given the requirements of Scott v. Germano, 381 U.S. 407 (1965). See August 21 Order, A-115. Any appeal of a state court decision issued after the legislature met in its 1992 session would necessarily progress first through the Minnesota state appellate process and only then to this Court. See August 21 Order, A-112, A-116. The federal court specifically noted the effect of the resulting appellate delay as grounds for asserting continued jurisdiction. See id.

reconvene in January 1992, the state court on December 9, 1991, issued a legislative redistricting plan. See Cotlow v. Growe, C8-91-985, Findings of Fact, Conclusions of Law and Order (hereinafter "State Court Legislative Plan") (Minn. Spec. Redis. Panel, Dec. 9, 1991), A-249. That plan essentially adopted amendments to Chapter 246 that appellant legislature proposed to enact in January 1992. Those amendments were passed by the legislature but were vetoed by the Governor on January 9, 1992. See Emison, 782 F. Supp. at 433-34.

The federal court similarly recognized the unconstitutionality of Chapter 246, citing its "numerous infirmities, including excessive population disparities and noncontiguous districts." Id. at 442. The federal court, because of the extent of constitutional defects in Chapter 246 and that chapter's perpetuation of Voting Rights Act violations, disregarded Chapter 246 in redrawing legislative districts. See id. at 442; see also Emison v. Growe, 4-91-202, Order Denying Stay (D. Minn., March 9, 1992) (hereinafter "Order Denying Stay"), SA-58. The federal court also drew new congressional district lines. See Emison, 782 F. Supp. at 446-49.

On March 2, 1992, plaintiff-intervenors in the state action brought a Motion to Dismiss or, in the Alternative, for Summary Judgment Regarding Congressional Plans, arguing that the federal court's congressional plan precluded any further action by the state court. See SA-115. A hearing on plaintiff-intervenors' motion was scheduled for March 23, 1992. See Cotlow v. Growe, MX91-001562, Affidavit (Minn. Spec. Redis. Panel, April 17, 1992), EBA-1-3. On or about March 18, 1992, at the initiative of the state court, plaintiff-intervenors agreed to an indefinite postponement of that hearing pending further action by this Court. See id. On April 15, 1992, without rescheduling a hearing on

plaintiff-intervenors' pending motion, the state court issued a congressional redistricting plan "to allow a complete record on review." Cotlow v. Growe, C8-91-985, Final Order (Minn. Spec. Redis. Panel, Apr. 15, 1992) (hereinafter "Final Order"), ABA-4. Plaintiff-intervenors moved for withdrawal of that order and for a hearing on their pending motion. See Cotlow v. Growe, C8-91-985, Plaintiff-Intervenors' Motion for Withdrawal of Final Order and Granting of the Relief Requested in Plaintiff-Intervenors' Motion Dated March 2, 1992, (Minn. Spec. Redis. Panel, Apr. 17, 1992), EBA-4. That motion was denied. See Cotlow v. Growe, MX 91-001562; C8-91-985, Final Procedural Order (Minn. Spec. Redis. Panel, Apr. 30, 1992), ABA-20.

ARGUMENT

I. THE FEDERAL COURT PROPERLY EXERCISED JURISDICTION.

A. The Federal Court Complied with Scott v. Germano Deference Requirements, While the State Court Did Not.

In Scott v. Germano, 381 U.S. 407, 409-10 (1965), this Court held that federal courts should retain jurisdiction over redistricting cases and should exercise that jurisdiction to enter appropriate orders, including redistricting plans, should state agencies fail to redistrict in a valid and timely manner. Even appellants concede that federal courts should proceed to resolve redistricting claims when state agencies fail to meet their redistricting responsibilities. See Brief of Appellants at 22.

The federal court below adhered to this principle. In its initial substantive order, the federal court unanimously mandated deference to the legislative process in accord with both Germano,

381 U.S. at 409-10, and White v. Weiser, 412 U.S. 783, 794-95 (1973). See August 21 Order, A-115. The federal court stated that governing law requires "[b]oth state and federal courts to defer to the legislature to draw a valid redistricting plan unless the legislature fails to act in a timely fashion."[6] Id.; see also Order Denying Stay, SA-60. As directed by Germano, the federal court unanimously refused to abstain; instead, it retained jurisdiction and proceeded to prepare contingent redistricting plans to be issued and made effective only upon the state's failure to enact valid and timely redistricting plans. See August 21 Order, A-116-117.

The federal court issued its plans only after the legislative process failed to produce redistricting plans.[7] The federal court

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[6]Despite this admonition, and in contravention of this Court's directed deference to the legislative process, the state court proceeded to develop and publish its legislative redistricting plan prior to the legislature's opportunity to act in January 1992. See State Court Legislative Plan, A-249. Cf. Weiser, 412 U.S. at 794-95; Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 196-97 (1972)(in reapportionment case, Court considered only "state policy" reached through legislative process); Smiley v. Holm, 285 U.S. 355, 373 (1932). Appellants' brief is silent as to the state court's preemptive action and its failure to defer to the legislative process. Cf. Brief of Appellants at 17-18.

The federal court recognized that the state court's issuance of a legislative redistricting plan was advisory, premature, and a clear interference with the legislative process, and the federal court therefore stayed the state court proceedings, pending action through the legislative process. See Order of Stay, A-150-154. This Court dissolved the stay on January 10, 1992, by which time the legislative process had failed to enact any plan. See Cotlow v. Emison, 112 S. Ct. 855 (1992); see also Emison v. Growe, 782 F. Supp. 427, 434 n.26 (D. Minn. 1992).

[7]In January 1992, the state legislature passed Senate File 1596, relating to legislative redistricting, and Senate File 1597, a congressional redistricting plan. See Emison, 782 F. Supp. at 433-34. Both bills were vetoed. See id. at 434. This Court has held that in Minnesota both the legislature and the Governor are integral parts of the legislative process. See Smiley v. Holm, 285 U.S. 355, 373 (1932).

issued its legislative redistricting plan only after it had also reviewed the state court's prematurely-issued legislative redistricting plan.[8]

The federal court found that the state court's plan perpetuated Voting Rights Act violations and failed to meet constitutionally-driven equal representation standards for court-ordered redistricting plans. See Emison, 782 F. Supp. at 434-46. The federal court further noted the numerous infirmities in and the unconstitutionality of Chapter 246, upon which the state plan was based, and it refused to defer for that reason and because the only proposed corrections had been expressly rejected by the executive. See id. at 442, 446. Cf. Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 197 (1972) (In reapportionment action, a vetoed reapportionment plan was not state policy.); see also Weiser, 412 U.S. at 797 (". . . the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge.").

The federal court was justified in acting. It faced time deadlines imposed by approaching elections, as well as a state court legislative plan that violated federal law and state and federal constitutional standards, was based on an unconstitutional statute, and was virtually identical to a plan vetoed by the Governor. See Emison, 782 F. Supp. at 431-46. The federal court's actions were entirely consistent with this Court's directive in Germano. See Germano, 381 U.S. at 409-10.

In challenging the federal court's actions, appellants falsely

[8]No congressional redistricting plan was prepared by the state court until almost two months after promulgation of the federal court's congressional redistricting plan.

paint a picture of federal court abuse of jurisdiction at the expense of state proceedings. See Brief of Appellants at 21. Their argument ignores the inherent limits in Germano and the federal court's adherence to those limits here. Affirmance of the federal court's decision will not invite re-litigation of issues timely and validly decided by state courts, nor would litigants be "fully able" to raise partisan interests in separate federal proceedings if not satisfied with state decisions. Cf. Germano, 381 U.S. at 409-10 (federal court's jurisdiction may be exercised only where the state fails to adopt valid and timely redistricting plans).

Affirmance in this case merely would recognize that federal courts should adopt redistricting plans where states have failed in that task. This result is fully in accord with Germano.[9]

B. Germano, not Younger v. Harris, Establishes the Appropriate Abstention Standard for Redistricting Cases.

Appellants and amici curiae Frost, et al. (hereinafter "the Frost amici") suggest that this case is appropriate for federal court abstention under Younger v. Harris, 401 U.S. 37 (1971). This argument ignores this Court's clear direction that federal courts retain jurisdiction in redistricting cases, as well as its repeated direction that federal courts exercise that jurisdiction, particularly in the protection of fundamental civil rights such as voting. See Germano, 381 U.S. at 409-10; Harman v. Forssenius, 380 U.S.

[9]It is also in accord with Members of the California Democratic Congressional Delegation v. Eu, Court File No. C-91-3383 (N.D. Cal., March 3, 1992), in which the federal court refused to abstain from proceeding until litigation long pending before the California Supreme Court was resolved. See id., slip op. at 8. The federal court examined the state supreme court's decision and only thereafter declined to act, concluding that the state court had produced a valid and timely plan. See id., slip op. at 7-9, 19-20.

528, 537 (1965); see also Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976).

This Court in Germano has already addressed the propriety of federal court jurisdiction in redistricting cases and the degree to which federal courts should abstain, if at all. See Germano, 381 U.S. at 409-10. As discussed above, the Court in Germano expressly directed that a federal court should retain jurisdiction, in the face of competing state proceedings, and should take appropriate action to ensure that redistricting is completed in a valid and timely manner. See id.

Appellants' argument also disregards limits to Younger abstention. In Younger, the Court recognized that abstention would be inappropriate in certain situations, such as where the challenged statute "flagrantly and patently" violates constitutional prohibitions. See Younger, 401 U.S. at 53-54. In Colorado River, 424 U.S. at 816, this Court addressed these limits further, stating that Younger abstention would not be appropriate in instances involving a "patently invalid state statute." That is precisely the case here.

Chapter 246, at issue in legislative redistricting, was declared wholly unconstitutional by the state court due to "numerous infirmities" and "numerous defects" that violated both the state and federal constitutions. See Pretrial Order No. 4, A-220, A-225. The federal court more clearly outlined the scope of the defects in the statute:

> In Emison, this court is facing population deviations in Chapter 246 as great as 43.45% above the ideal and 45.10% below the ideal, with the total range of these deviations resting at 88.55% -- this is 22.11 times the overall range which the Minnesota Legislature has imposed on itself.

* * *

> [T]his court is being asked to adopt approximately 160 corrections to Chapter 246 which allegedly affect over thirty state senate and house districts in approximately one third of the state's eighty-seven counties.

Emison, 782 F. Supp. at 446 n.50. Chapter 246 is exactly the type of "patently invalid state statute" to which Younger abstention does not apply. See Colorado River, 424 U.S. at 816.

Appellants and the Frost amici raise Younger abstention in a cursory manner. They define Younger abstention with reference to protection of "vital" or "important" state interests. Brief of Appellants at 15 n.9; Frost Amici Brief at 12. However, neither brief attempts to identify those interests. Cf. id.

Younger abstention was raised for the first time in this proceeding in appellants' and the Frost amici's merits briefs. The only abstention previously sought by appellants, even as late as their jurisdictional statement, was the Germano requirement of conditional deference. That case, however, expressly recognizes a federal court's right to redistrict in particular circumstances. See Germano, 381 U.S. at 409-10.

A suggestion that complete abstention under Younger is merited here is in direct contravention to the holding in Germano. It is also contrary to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River, 424 U.S. at 817; see also 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (jurisdiction over civil actions on civil rights and elective franchise), 2284(a) (appointment of three-judge courts for redistricting disputes); 42 U.S.C. § 1973 (jurisdiction under Voting Rights Act).

Abstention is a narrow exception to a federal court's duty to adjudicate a controversy properly before it, particularly where

voting rights issues are presented. In Harman v. Forssenius, 380 U.S. 528, 537 (1965), a voting rights case, this Court found no abuse of discretion in the district court's refusal to abstain in favor of a state court:

> [T]he district court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. . . . Given the importance and immediacy of the problem and the delay inherent in referring questions of state law to state tribunals, it is evident that the district court did not abuse its discretion in refusing to abstain . . . .

The Court also stated that "recognition of the role of state courts as final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." Id. (quoting England v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411, 415-16 (1964)).

The federal complaints here raised claims not before the state court. The Emison complaint alleged violations of the Voting Rights Act and sought affirmative relief. See Emison Complaint, A-82-88. The Benson complaint was brought by individuals who were not parties to the state action and who raised constitutional challenges to Chapter 246 and requested appropriate relief. See Benson Complaint, SA-63. The federal court repeatedly stated that it could not abstain because of these issues unique to the federal action. See August 21 Order, A-112-113; Order of Stay, A-144-145; Emison, 782 F. Supp. at 432.

The federal court appropriately resolved all outstanding issues by adjudicating claims that two separate groups of plaintiffs had chosen to bring before it. Once convened, the jurisdiction of a three-judge court under 28 U.S.C. § 2284(a) "extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decisions of such of the questions

as in its opinion effectively dispose of the case." Sterling v. Constantin, 287 U.S. 378, 393-94 (1932), cited in Emison, 782 F. Supp. at 430-31.

Appellants have identified no unique facts, issues, or interests supporting abstention. The mere pendency of a state proceeding is not a reason for a federal court to abstain. See McClellan v. Carland, 217 U.S. 268, 281-82 (1910). The federal court was the only court presented with Voting Rights Act issues and constitutional challenges to Chapter 246. The federal court properly resolved all issues before it, and, in so doing, it resolved all issues that were before the state court.

II. THE FEDERAL COURT PROPERLY ISSUED A LEGISLATIVE REDISTRICTING PLAN.

A. The Federal Court Properly Adjudicated the Voting Rights Act Claims Before It, and Its Order Was Supported by the Evidence.

Section 2(a) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, prohibits imposition of any voting standard, practice, or procedure that results in a denial or abridgement of the voting rights of minority citizens. Section 2 applies whenever "the totality of the circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation of members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988) (emphasis added). This Court has held that this Act is a "broadly worded statute" and is to be interpreted with "the broadest possible scope." Chisom v. Roemer, 111 S.Ct. 2354, 2368 (1991).

1. The Federal Court Had an Affirmative Obligation to Address All Claims Before It, Including the Voting Rights Act Claims of the Emison Plaintiffs.

The Emison complaint specifically alleged that legislative district boundaries on the Red Lake and White Earth Reservations and in Minneapolis violated § 2(a) of the Voting Rights Act, 42 U.S.C. § 1973(a)(1988). No such allegations were raised by any party in the state court proceeding. The federal court therefore was obligated to retain jurisdiction and determine, inter alia, "whether voting rights violations have been proven in this case." Emison, 782 F. Supp. at 435. The federal court also was required to ensure that any plan, whether enacted through the legislative process or issued by a court, provided adequate relief if Voting Rights Act violations were found. See August 21 Order, A-116.

Appellants' contention that the Emison appellees' claims concerning Voting Rights Act violations did not extend to or were otherwise mooted by Chapter 246 is unsupportable. The pleadings before the federal court alleged that the legislative districts instituted by order of a three-judge federal court panel in LaComb v. Growe, 541 F.Supp. 160 (D. Minn. 1982), violated the Voting Rights Act. The court's order in LaComb expressly prohibited "holding or conducting any future elections for the Minnesota Legislature under any apportionment plan except that which we adopt today or a constitutional plan adopted after this date by the State of Minnesota." Id. at 166-167 (emphasis added). Chapter 246 was passed late in the 1991 legislative session in an effort to replace the legislative districts ordered in LaComb in 1982. However, the state court panel subsequently determined that Chapter 246 was unconstitutional:

> We conclude that numerous infirmities, including noncontiguous districts, invalidate Minnesota's present districting law, Minnesota Laws, 1991, Chapter 246, under the Minnesota Constitution, Article IV, sections 2 and 3 . . . .
>
> We also conclude that Minnesota Laws 1991, Chapter 246 is invalid under the United States Constitution . . . .

Pretrial Order No. 4, A-219-220.[10] Chapter 246 was not a constitutional plan of redistricting, and it therefore did not supersede the plan of legislative districts issued in LaComb v. Growe.[11] The legislative districts ordered by the federal court in 1982 remained in effect. The Emison appellees' Voting Rights Act challenges to those existing districts remained viable.

Appellants' alternative contention that the state court properly resolved any Voting Rights Act claims is not only meritless, but also would create dangerous precedent if accepted. The state court did not have before it by pleading any allegation concerning the Voting Rights Act. Plaintiff-intervenors in the state action so advised the court and consistently objected to the state court's authority and effort sua sponte to adjudicate the Voting Rights Act issue. See Memorandum of Plaintiff-Intervenors Regarding Exclusive Federal Jurisdiction Over Voting Rights Act Claims, SA-107. The state court acknowledged these challenges to "the applicability and justiciability of Voting Rights [Act] claims in this proceeding," Cotlow v. Growe, C8-91-985, Pretrial Order No. 5 (Minn. Spec. Redis. Panel, Nov. 8, 1991), A-228, but

[10]The federal court made a similar determination. See Emison, 782 F. Supp. at 442 (" . . . Chapter 246 was a hastily drafted bill containing numerous errors. These constitutional defects were acknowledged by all of the parties. We agree that Chapter 246 is unconstitutional.").

[11]The determination that Chapter 246 was patently unconstitutional necessarily invalidated that bill's repealer of the 1983 legislative enactment that codified the LaComb districts.

proceeded to declare that "Minnesota Laws 1991, Chapter 246, complies with the Federal Voting Rights Act," without further comment. State Court Legislative Plan, A-259.

Further, the state court's conclusion of Voting Rights Act compliance applied only to Chapter 246, an act the same court had already determined to be unconstitutional. See Pretrial Order No. 4, A-219-220.

The state court's decision was a patent attempt to pre-empt subsequent federal court action and was an improper effort to bind non-parties who had properly asserted Voting Rights Act claims in the separate federal proceeding. To allow Voting Rights Act § 2 to be used in this fashion by a state court undermines the Act and jeopardizes the rights that it is intended to protect. This is particularly true where, as in the present case, the federal court subsequently found that the state court's own plan violated the Voting Rights Act.

2. The Federal Court Properly Found Voting Rights Act Violations.

The Voting Rights Act applies a "totality of the circumstances" test to alleged violations of § 2. 42 U.S.C. § 1973(b). As the Court emphasized in Thornburg v. Gingles, 478 U.S. 30, 44 (1986)(citing S. Rep. No. 417, 97th Cong. 2d Sess. 28-29 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News (hereinafter "1982 U.S.C.C.A.N.") 177, 206-207), a court must assess the impact of the contested structure or practice "on the basis of objective factors" to determine the ultimate question:

> . . . whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

The Court has recently rejected the use of judicially created

limitations to restrict coverage under § 2. In Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991), the Court stated:

> [T]he standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the totality of the circumstances described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

a. The Gingles Preconditions Do Not Apply in Challenges Involving Single Member Districts.

Appellants and amicus Department of Justice (hereinafter "amicus DOJ") contend that the three preconditions in Gingles, 478 U.S. 30, a case involving multimember districts, constitute a threshold requirement for a finding of a Voting Rights Act violation in this case, which involves single-member districts.[12] This simplistic contention is an effort to impose further judicially created limitations of the type expressly rejected by the Court in Chisom.

Gingles involved the challenge of a state legislative redistricting plan that used multimember districts, and it is limited to that circumstance. Id. at 48 (" . . . unless there is a conjunction of the following [preconditions] the use of multimember districts

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[12]Like at-large elections, multimember districts simply raise the number of votes necessary to achieve election, making it increasingly difficult for anyone other than a member of the majority group to obtain any representation in the legislative body. This case addresses a quite different device: the drawing of district boundaries in such a way as to make it difficult or impossible for minorities to obtain seats in a legislature organized on a single-member district basis.

generally will not impede the ability of minority voters to elect representatives of their choice"). The Court stated:

> [W]e have no occasion to consider whether the standards we apply [to multimember district vote dilution claims] . . . are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single member districts resulted in the dilution of the minority vote.

Id. at 47 n.12 (emphasis added). The Emison complaint alleges that splitting of large and geographically cohesive minorities between two or more single-member districts resulted in the dilution of the minority vote.

The rationale for applying preconditions to multimember district challenges does not apply to single-member district challenges. The purpose of Voting Rights Act § 2 is to address electoral procedures that result in minority voters having "less opportunity than other members of the electorate to participate in the political process." 42 U.S.C. § 1973(b). One such device is multimember districts, which the Court in Gingles acknowledged inherently tend to "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." Gingles, 478 U.S. at 47 & n.13 (citing Burns v. Richardson, 384 U.S. 73, 88 (1966)); see also id. at 87 (O'Connor, J., concurring). However, the Court also observed that multimember districts were not "per se violative of minority voters' rights." Id. at 48. Therefore, to avoid inevitable legal challenges any time that minorities are not elected in direct proportion to their population, the Court established threshold preconditions for any challenge to multimember forms of districting by requiring that a minority group first establish that it would otherwise be guaranteed the

opportunity to control at least one single-member district.

Second, there is a difference between the diluting effects that can be found in multimember districts and those that may be found in redistricting a legislature with single-member districts. As a three-judge panel in Armour v. State of Ohio, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991), recently observed, single-member districts possess their "own unique opportunities for abuse, of which racial gerrymandering is a prime example." To apply the three preconditions in Gingles to single-member districts, one of which conditions is that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," would invite racial gerrymandering and create a device to limit the fair opportunity for participation in the electoral process by establishing a barrier for potential legal challenges.

By way of example, a single-member district with a potential single minority group population of 49% of the total voting population in the district could be divided into two districts, reducing the minority population in each district to 24.5%. A court reviewing the "totality of the circumstances" could find that such districting had the effect -- intentional or otherwise -- of reducing the opportunity of minority members "to participate in the political process and to elect representatives of their choice," in violation of 42 U.S.C. § 1973(b). Such a result could also be the product of an intentional but difficult to prove gerrymander. However, under the Gingles preconditions as advocated by appellants and amicus DOJ, members of the affected minority community would be unable to meet even the first threshold requirement of Gingles -- that they constitute "a majority in a single-member district." Gingles, 478 U.S. at 50. Such an absurd result ignores the intent and purpose of the Voting Rights Act. The district court in Armour thus concluded:

> We cannot agree with the defendants that a government may with impunity divide a politically cohesive, geographically compact minority population between two single-member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed a single district's population divided by two.

Armour, 775 F. Supp. at 1052.

The Court in Chisom made clear its intent to give full effect to the broad language and purpose of the Voting Rights Act, ensuring that members of minority groups have no less opportunity to participate in the political process and to elect representatives. The federal court here, looking at the totality of the circumstances, achieved that purpose.

b. The Evidence Supported a Finding of Voting Rights Act Violations.

Whether redistricting schemes or electoral structures ultimately have a diluting effect is a fact question subject to the clearly erroneous standard of Rule 52(a). See Rogers v. Lodge, 458 U.S. 613, 622-627 (1982); City of Rome v. United States, 446 U.S. 156, 183 (1980); White v. Regester, 412 U.S. 755, 765-770 (1973). With respect to the Voting Rights Act § 2 claims in this matter, appellants and amicus DOJ have made no showing that the federal court's finding of a Voting Right Act violation, based on the "totality of circumstances," was clearly in error.

In reviewing the evidence in this case, the federal court was guided both by the directives of this Court and legislative history. First, this Court has directed that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." Chisom v. Roemer, 111 S. Ct. at 2368 (1991) (quoting Allen v. State Board

of Elections, 393 U.S. 544, 567 (1969)).

Second, the Senate Judiciary Committee Report that accompanied the 1982 bill amending § 2 identified specific factors to be considered in determining the totality of circumstances that could show a violation of the Voting Rights Act within the meaning of § 2. See 1982 U.S.C.C.A.N. at 206-07; Emison, 782 F. Supp. at 436-37 (quoting factors). These factors need not all be proven by plaintiffs, nor must even a majority of the factors "point one way or the other." 1982 U.S.C.C.A.N. at 207. "The failure . . . to establish any particular factor is not rebuttal evidence of non-dilution." Id. at 207 n.118.

Third, when considering the totality of the circumstances, a court is to make its determination "upon a searching practical evaluation of the past and present reality." Gingles, 478 U.S. at 79 (citation omitted). Such a determination is peculiarly dependent upon the facts of each case, and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanism. Id. (citing Rogers, 458 U.S. at 621-622). This Court stated in White v. Regester, 412 U.S. 755, 769-770 (1973):

> We are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . [multimember] district in the light of past and present reality, political and otherwise.

The federal court in this case, "composed of local judges who are well acquainted with the political realities of the state," Gingles, 478 U.S. at 80, analyzed and applied the Senate Report's factors to available evidence and found that legislative districts in the City of Minneapolis violated the Voting Rights Act. See Emison, 782 F. Supp. at 436-41. The federal court further determined that neither Chapter 246 nor the state court's similar plan corrected those violations. Id. at 440.

Most indicative of § 2 violations was the lack of minority representation in the Minnesota legislature. See id. at 437-38. The only factor expressly mentioned in § 2 is "the extent to which members of a protected class have been elected to office in the State or political subdivision.. . ." 42 U.S.C. § 1973(b) (1988). The state senate currently has no minority members from Minneapolis, nor has a minority senator been elected from Minneapolis in recent history. See Emison, 782 F. Supp. at 437-38. There is only one state representative from Minneapolis who is a member of a minority group, and Minneapolis has elected just two minority house members in the past decade. See id. at 437. Both were from the same district. See id.

The 1982 legislative districts, which did not include a "super-majority" minority senate district, resulted in election of no minority senators. See id. at 437-38. These results are entitled to great weight as evidence of Voting Rights Act violations, because 1982 amendments to the Act sought to "make clear that certain practices or procedures that result in denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." See id. at 438 (emphasis in original).

Minneapolis minority legislative representation is significantly below the proportion of minorities in the city's population. See id. Proportional representation would entitle minorities to four seats of the eighteen available in Minneapolis districts. See id. Nevertheless, minorities have held just one seat in the past decade. See id. While proportional representation is not an entitlement under the Voting Rights Act, lack of proportional representation of minorities is one of the "circumstances" suggested in the Senate Report as indicating a § 2 violation. See 1982 U.S.C.C.A.N. at 206-07.

The federal court also observed that the only minority representative now in the state house of representatives was elected from a super-majority minority district. See Emison, 782 F. Supp. at 438. This suggests the representational effect that can be achieved by concentrating minorities in super-majority minority districts to allow the effective assertion of minority voting rights through enhancement of bloc voting. Cf. 1982 U.S.C.C.A.N. at 206-07.

A "super-majority" concentration can be achieved in a Minneapolis senate district. See Emison, 782 F. Supp. at 438. This senate district, number 59 in the federal court's plan, concentrates minorities in proportions similar to those previously found to be effective in achieving minority representation in the state legislature.[13] See id. The super-majority minority district seeks to correct the historical lack of minority representation.

In finding Voting Rights Act violations, the federal court also relied upon the extent to which minorities in Minnesota bore the effects of discrimination in education, employment, or health. See id. The federal court noted recent judicial findings that the Minneapolis public school district had "acted intentionally to maintain or increase racial segregation in the schools." Id. (quoting Booker v. Special Sch. Dist. No. 1, Minneapolis, 451 F.

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[13]Appellants have suggested that such a district is opposed by "leaders of the Black community in Minneapolis . . . ." Jurisdictional Statement at 19 n.12; see also Brief of Appellants at 37 n.28. But see SA-231.

Appellants also have suggested that the federal court failed to draw a true super-majority minority district because of voting age considerations. See Jurisdictional Statement at 16-17 & n.9; A-381, A-383. Appellants fail to note that redistricting is based upon total population; that the data upon which they rely are now almost two years old; and that the plan presumably will be in effect for ten years. The federal court's plan in any event creates a district with a minority population fully ten percent higher than any minority district drawn by the state court. See A-383.

Supp. 659, 660 (D. Minn. 1978)). Minneapolis school district policies had been found to be "especially offensive due to defendant's knowledge of the extensive nature of housing segregation within its bounds." Id. (quoting Booker v. Special School Dist. No. 1, Minneapolis, 351 F. Supp. 799, 809 (D. Minn. 1972))(emphasis added).[14]

The federal court found that the legislative districts created by Chapter 246 and by the state court plan reflected "voting practices or procedures that may enhance the opportunity for discrimination . . .," another of the Senate Report's factors. See id. at 438-39; Order Denying Stay, SA-61 ("[T]he plan proposed by [appellant legislature] and adopted by the state court is not only gerrymandered to protect incumbents in Minneapolis, foretelling the continued dilution of minority voting rights, but it also contains unwarranted population deviations and lacks compactness

[14] Appellants challenge the federal court's reference to a newspaper publication article reflecting continued performance gaps between minorities and whites in the Minneapolis school district. See Brief of Appellants at 39. It is clear from even a cursory reading of the federal court's decision that the court's primary reliance was on express judicial findings made as recently as 1978. See Emison, 782 F. Supp. at 438.

Appellants additionally criticize the federal court's reference to Minnesota's history of official discrimination, see Brief of Appellants at 39, but they fail to note that the court expressly did not rely on that history. See Emison, 782 F. Supp. at 438-39 n.35. It is clear both from the federal court's language in footnote 35 and its ultimate conclusions that the court instead relied on other sufficient evidence of Voting Rights Act violations. See id. at 438-39 n.35, 439-40.

Appellants finally suggest that a subsequent order in the Booker case somehow eradicated the "effects of discrimination in education" that are to be considered in the Senate Report's list of factors. See Brief of Appellants at 39 n.31. However, the order cited by appellants itself makes clear that there is ongoing monitoring of the implementation of long-range plans for integration/desegregation in the Minneapolis public school districts. See ABA-66.

statewide." (emphasis added)).

The federal court found that Chapter 246 was designed "to protect incumbents in the City's overwhelmingly white legislative delegation." Emison, 782 F. Supp. at 438-39. Of eighteen Minneapolis legislators, Chapter 246 paired no incumbent senators; house members were paired only once. See id. at 439. The federal court stated that incumbent pairing should have been inevitable in light of the population decline in Minneapolis. See id. at 439 & n.37. The court concluded that this avoidance of incumbent pairing was apparently done in "priority over the protection of minority interests in the plan proposed by [appellant legislature]." Id. at 439.

Incumbent protection by Chapter 246 and the state court's plan, see id.; Order Denying Stay, SA-61, was clearly not "state policy," see Emison, 782 F. Supp. at 439 n.37. To the contrary, state policy found in a joint legislative resolution calls for avoidance of dilution of minority voting strength and for increases in the probability of election of minority legislators. See id.

Incumbent protection is a voting practice and procedure that enhances the opportunity for discrimination against minorities. See id. at 438-39. Accordingly, the practice of incumbent protection at the expense of minority representation is a factor weighing in the "totality of circumstances" under § 2, and it is an additional circumstance that demonstrates a Voting Rights Act violation. Cf. 1982 U.S.C.C.A.N. at 206.

The facts demonstrated minority vote dilution in Minneapolis, in violation of Voting Rights Act § 2. See Emison, 782 F. Supp. at 439. The federal court stated:

> The all-white senate delegation from Minneapolis, the significant proportional underrepresentation of minorities from the overall legislative delegation from Minneapolis, the apparent attempt to protect

> incumbencies at the expense of minority concentrations, the fragmentation of a geographically cohesive minority population into different senate districts, the educational disadvantage of Minneapolis minorities, the segregation in the Minneapolis school districts, and the judicial experience showing the need for super-majority minority districts, when considered all together, are sufficient to create a prima facie case in the totality of the circumstances which exist here.

Id. at 439-40.

In remedying the violations, the federal court rejected appellant legislature's proposed plan, which essentially was Chapter 246 as it was proposed to be amended by Senate File 1596. See id. at 440. The federal court found that this plan and the state court's plan, adopted from appellant legislature's proposal, perpetuated Voting Rights Act violations. See id. The federal court therefore issued a plan that remedied Voting Rights Act violations by creating a super-majority minority senate district. See id. at 440-41. The federal court's action was fully supported by the facts, and its plan was necessary to effectuate the purposes of the Act.

Appellants and amicus have failed to demonstrate that the federal court's finding of minority voting rights violation in single-member districts in the City of Minneapolis in this instance was clearly in error.

B. The Federal Court Based Its Legislative Redistricting Plan Upon All Valid, Discernible State Policy.

All parties to this appeal agree that a court must be guided by discernible state policy in redistricting. See White v. Weiser,

412 U.S. 783, 794-95, 797 (1973); Brief of Appellants at 43. The federal court specifically acknowledged this responsibility. See Emison, 782 F. Supp. at 442, 446. Therefore, it is essential to review the state policy considered by the federal court in determining whether that court was clearly erroneous in its application of the "state policy" standard established by this Court.

1. The Federal Court Properly Based Its Legislative Plan on State Policy.

In drawing its legislative plan, the federal court considered criteria in a joint legislative resolution, which appellant legislature has acknowledged reflects state policy. See id. at 442-43 & n.44. The resolution established 2%, plus or minus, as the maximum permissible population deviation from the ideal for legislative districts. See id. at 444. The federal court's house plan has a total population deviation of 1.40% (from the maximum negative deviation to the maximum positive deviation), and its senate plan has a total deviation of 1.20%. See id. at 444.

By minimizing population deviations, the federal court's legislative plan better met the policy requirement of Minnesota Constitution, article IV, § 2, which provides that "representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof." The federal court's plan also met this Court's requirement that court-ordered reapportionment plans be held to stricter standards and "strive to achieve 'the goal of population equality with little more than de minimis variation.'" Emison, 782 F. Supp. at 443 (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)).[15]

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[15]The state court's failure to adopt a plan in conformity with the requirement of de minimis population deviations in court-adopted plans constitutes an additional ground for upholding the federal court's action. The state court

The federal court's legislative plan also achieves state policy goals of preserving minority voting strength and increasing the probability of minority representation, while the appellant legislature's proposal, as adopted by the state court, does not. Cf. id. at 440, 443 (stating state policy). The federal court's plan creates a super-majority minority senate district in Minneapolis with a total minority concentration of 60% and an African-American concentration of 43%, percentages proven adequate to elect minority members to the legislature from Minneapolis. See id. at 438, 448. Neither the legislative plan proposed by appellant legislature nor the state court's plan contained such a district.

Additionally, the federal court's legislative plan also establishes compact districts, meeting another requirement of state policy. See id. at 442, 444-45. In accord with this state policy, a recent scholarly article suggests that a requirement of electoral district compactness must be imposed as a procedural safeguard

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recognized as one of its criteria for legislative redistricting the goal of de minimis population deviations in court-ordered plans. See Cotlow v. Growe, MX 91-001562, Pretrial Order No. 2 (Minn. Spec. Redis. Panel, Aug. 16, 1991), A-205; see also Chapman, 420 U.S. at 21-27. However, the federal court's plan "has significantly lower population deviations from the ideal than the plan[] proposed by the defendant-intervenors," which was virtually identical to the legislative plan ordered by the state court. See Emison, 782 F. Supp. at 443. As the federal court concluded:

> The defendant-intervenors' plan fails to give each citizen of Minnesota an equally effective voice in the election of members to the legislature.
>
> • • •
>
> We do not perceive any justification for the population disparities in their plan [This] court's plan is more compact, splits fewer cities and townships, better protects minority voting rights, and still contains substantially lower population deviations.

Cf. Karcher v. Daggett, 466 U.S. 910, 911 (1984)(Stevens, J., concurring).

against partisan gerrymandering. See Polsby and Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Policy Review 301 (1991) (hereinafter "Polsby and Popper"). Polsby and Popper define gerrymandering as a manipulation of district lines for partisan purposes. See id. at 301-02.

The effect of gerrymandering on an individual's vote is essentially the same as the evil corrected by the apportionment cases in establishing the "one person, one vote" standard mandating that electoral districts have equal populations. See Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Wesberry v Sanders, 376 U.S. 1 (1964) (federal districts) Baker v. Carr, 369 U.S. 186 (1962); see generally Polsby and Popper at 321-26.

Polsby and Popper conclude that the most appropriate remedy for gerrymandering is to require that:

> In addition to adhering to criteria which mandate that representational districts be composed of continuous territories and have equal populations, . . . those who define district boundaries must also be required to respect a third criterion, the constraint of compactness. Without the ability to distend district lines so as to include or exclude blocks of voters whose political loyalties are known, it is not practically possible to gerrymander. The diagnostic mark of a gerrymander is the noncompact district.

Polsby and Popper at 302 (emphasis added).

The federal court analyzed its legislative redistricting plan and the other submitted plans using both a visual compactness analysis and a statistical analysis suggested by Polsby and Popper. See Emison, 782 F. Supp. at 444-45 & n.47; February 19 Order Exhibits, SA-31, SA-46. The federal court's analysis demonstrated that its legislative plan was by all measures more compact than the

other plans before it, except that the federal court's plan and appellant legislature's plan scored the same for senate district compactness on the Polsby and Popper index.[16] See Emison, 782 F. Supp. at 445 & n.47; February 19 Order Exhibits, SA-31, SA-46.

2. The Federal Court Properly Rejected Chapter 246, Chapter 246 As the Legislature Proposed to Amend It, and Chapter 246 As Adopted by the State Court As Valid Expressions of State Policy.

a. Chapter 246 Was Not Entitled To Deference As State Policy.

No party can reasonably suggest that an election could be held under Chapter 246. The federal court specifically found that it "could not discern any state policy from the unconstitutional Chapter 246." Order Denying Stay, SA-61. In light of Minnesota law regarding what is "legislative history" and this Court's preference to leave to the legislative process the first opportunity to re-draw legislative district lines, it would have been improper for the federal court to have speculated as to what the legislature might have done to correct Chapter 246's infirmities had they been recognized prior to that bill's passage and enactment.[17] Certainly,

[16]The federal court's creation of the super-majority minority senate district in Minneapolis reduced its plan ratio from .51 to .40. See February 19 Order Exhibits, SA-47 n.2. Without that district, which appellant legislature's plan does not contain, the federal court's plan is significantly more compact than appellant legislature's plan. See id.

[17]The Minnesota Supreme Court described materials that are "legislative history" in Handle With Care v. Department of Human Serv., 406 N.W.2d 518, 522 (Minn. 1987) (quotation omitted):

> [W]e may consider events leading up to [the legislation], the history of its passage, and any modifications made during its

the federal court was not "clearly erroneous" in refusing to consider as state policy a plan that it determined has pervasive constitutional and statutory defects, "contains unwarranted population deviations," and "lacks compactness statewide." See Order Denying Stay, SA-61 (emphasis added).

This is not a situation parallel to that in Weiser, 412 U.S. 782, or Upham v. Seamon, 456 U.S. 37 (1982). Unlike the plans in Weiser and Upham, the maximum population deviations in Chapter 246 ranged as much as 45.10% from the ideal. See Emison v. Growe, Civ. No. 4-91-202, Dempsey Affidavit (D. Minn., Oct. 10, 1991), SA-99; see also Emison, 782 F. Supp. at 446 n.50.[18] Chapter 246 therefore did not present issues, as in Weiser and Upham, involving "relatively minor deviations from the optimal reapportionment plan which could easily be remedied without affecting other district lines." Emison, 782 F. Supp. at 446 n.50.

Chapter 246 also created noncontiguous districts in violation of Minnesota Constitution, article IV, § 3. See, e.g., Legislative Maps, SA-184. Additionally, Chapter 246 in several instances assigned the same territory to different districts. See, e.g., id., SA-188. Because of the breadth of these defects and the

> course. We look to committee reports and journal entries. In addition the legislature now tape-records its committee meetings and floor debates, and we have, on occasion, considered transcripts of those recordings.

No committee reports or journal entries were available for the federal court's use. No minutes from the House Redistricting Committee meeting at which Chapter 246 was considered were available. The federal court did not even have a map of the legislative districts created by Chapter 246. See Emison, 782 F. Supp. at 442 n.43. Instead, appellant legislature provided only a map reflecting how the legislative majority caucuses intended to amend Chapter 246 when the legislature reconvened.

[18]In some instances, district lines necessarily were assumed in light of the inadequate descriptions in Chapter 246.

variety of possible corrections, the federal court's conclusion that it "could not discern any state policy from the unconstitutional Chapter 246," see Order Denying Stay, SA-61, is certainly not clear error.

Weiser supports the federal court's action. Even if state policy is discernible, "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." Weiser, 412 U.S. at 797 (emphasis added); see also Karcher v. Daggett, 466 U.S. 910, 911 (1984) (Stevens, J., concurring) ("Once a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy.").

Similarly, in Upham, 456 U.S. 37, the congressional redistricting plan contained only minimal flaws, allowing the court to perceive and preserve state policy by making only a few changes. See generally id. The federal court here distinguished Weiser and Upham and found that "Chapter 246 contained numerous infirmities, including excessive population disparities and noncontiguous districts." Emison, 782 F. Supp. at 442 & n.43, 446 & n.50.[19] The court recognized Chapter 246 for what it was -- "a hastily drafted bill containing numerous errors" that were "constitutional defects" acknowledged by all the parties. Id. at 442.

The federal court could only speculate as to how legislators might have corrected Chapter 246 had its defects been known at the time of passage. For example, correction of population disparities requires changes not only to the boundaries of the affected districts, but also to one or more neighboring districts. If contiguous districts with opposite but corresponding population deviations cannot be identified, then non-adjoining, more distant districts must be identified and changed, necessitating alterations to districts adjoining them. This "falling domino" process demonstrates the impossibility of determining any cognizable legislative intent from what remains of Chapter 246 after removal of unconstitutional or otherwise invalid legislative districts.

Appellants maintain that the federal court was limited "to redistricting only those districts that it found to be invalid." Brief of Appellants at 46. Contrary to appellants' suggestion, however, the invalid districts were by no means limited to the City of Minneapolis. Simply stated, Chapter 246 required extensive redrafting, not just technical corrections, before an election could possibly be conducted under it. Such redrafting necessarily would require the court to engage in rampant speculation regarding the policy goals that might be reflected in that chapter.

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[19]In addition to the grounds relied upon by the federal court, Weiser is distinguishable on other grounds. First, Weiser involved congressional redistricting, where stricter population equality is required, and the plan rejected by the lower court but selected by this Court in Weiser "achieved the goal of population equality to a greater extent than did [the other plan]." Weiser, 412 U.S. at 796. Also, the lower court in Weiser "did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable." Id. at 797. In this case, the federal court expressly found that Chapter 246 was unconstitutional, that incumbent protection was not state policy, and that the incumbent protection goals in the City of Minneapolis violated the voting rights of minority residents of that city. See Emison, 782 F. Supp. at 436-42 & n.37.

b. The Proposed Amendments to Chapter 246 Were Not Entitled to Deference As State Policy.

Senate File 1596[20] was passed by the legislature but vetoed by the Governor in January 1992. Appellants imply that Senate File 1596 was proper state policy, but they fail to reveal that the legislation was vetoed and therefore could not be considered state policy. Cf. Brief of Appellants at 45 with Emison, 782 F. Supp. at 442; see also Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 197 (1972) (refusing to treat vetoed reapportionment plan as state policy). Because of the Governor's veto, however, Senate File 1596 was not entitled to deference under Weiser, 412 U.S. 783. See id., Major v. Treen, 574 F. Supp. 325, 335-36 n.15 (E.D. La. 1983); Carstens v. Lamm, 543 F. Supp. 68, 79 (D. Colo. 1982); Shaver v. Kirkpatrick, 541 F. Supp. 922, 932 (W.D. Mo.), aff'd sub nom. Schatzle v. Kirkpatrick, 456 U.S. 966 (1982)[21]; O'Sullivan v. Brier, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

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[20]Senate File 1596, covering 63 pages of text, proposed to correct 160 errors in more than 30 state senate districts and house districts in approximately one-third of the state's 87 counties. See Emison, 782 F. Supp. at 446 n.50; Senate File 1596, SA-120.

[21]Throughout this litigation, appellants have cited Shaver for the proposition that a vetoed redistricting plan may constitute state policy, and they continue to do so here. See, e.g., Brief of Appellants at 47-48. The opinion itself suggests otherwise:

> [W]e cannot simply embrace as our own the bill that went the furthest or that experts believe would have or could have passed. Such action would be a massive intrusion into the legislative process. We would, in effect, be amending the rules for enacting legislation. Although political scientists may argue over the extent to which the legislative process reflects the will of the people, we must take the procedures as we find them.

Shaver, 541 F. Supp. at 932.

Courts have consistently held that vetoed redistricting plans are not "state policy." See id. In O'Sullivan, 540 F. Supp. at 1202, the district court addressed precisely this question, stating:

> Although a federal court should defer to any enacted, constitutionally acceptable state redistricting plan, [Weiser, 412 U.S.] at 795, 93 S. Ct. at 2354, we are not required to defer to any plan that has not survived the full legislative process to become law. See Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 197, 92 S. Ct. 1477, 1484, 32 L. Ed. 2d 1 (1972).

See also Major, 574 F. Supp. at 335-36 n.15 ("Both the Governor and the legislature are integral components of the legislative process; thus any plan that does not survive this process to become law must be regarded as 'proffered current policy' which, though entitled to thoughtful consideration, cannot be deemed a clear articulation of established state goals."); Carstens, 543 F. Supp. at 79. As recognized in Carstens, appellants' position would mean that a partisan state legislature could "simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal." Carstens, 543 F. Supp. at 79. No court should override a governor's veto in this way, when the legislature has not done so. See id.

Further, the federal court held that "Chapter 246, as well as the modifications proposed in Senate File 1596, do not [sic] provide a remedy for the diminution of minority voting rights we have addressed." Emison, 782 F. Supp. at 442. On that ground as well, Chapter 246 and Senate File 1596 were not entitled to deference. See id.

c. The State Court's Revisions to Chapter 246 Were Not Entitled to Deference As State Policy.

Even if the state court's plan had been properly presented

to the federal court (see infra § II.C), the plan would not have been entitled to deference by the federal court, which had carefully maintained its jurisdiction over all the issues raised by the parties before it. In fact, the federal court found that the state court plan perpetuates violations of the Voting Rights Act. See Emison, 782 F. Supp. at 440. In light of this finding and the Governor's express rejection of Senate File 1596, which was virtually identical to the state court's legislative plan, Weiser mandates that the federal court not give deference to that state court plan. Like Chapter 246 and Senate File 1596, Chapter 246 as adopted by the state court was "vulnerable to legal challenge," as is reflected by the federal court's findings of statutory and constitutional violations. Cf. id. with Weiser, 412 U.S. at 797.

C. The State Court's Legislative Redistricting Plan Was Not Entitled to Preclusive Effect.

1. The State Court's Plan Was Not Preclusive Under the Full Faith and Credit Act.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a valid and authenticated state judgment is entitled to full faith and credit in federal courts to the extent that the judgment would have preclusive effect under the state's laws. See 28 U.S.C. § 1738; Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, § 4469 at 659-60 (1981, supp. 1991). To merit such treatment, however, the judicial records or proceedings at issue must carry the attestation of the clerk and annexation of the seal of the court from which the records are derived, if a seal exists. See 28 U.S.C. § 1738. Only acts, records, or proceedings that have been so authenticated shall receive a second court's "full faith and credit." See id.

Appellants in seeking full faith and credit for the state court's legislative redistricting plan fail to note that the state court's acts, records, and proceedings were never authenticated in the manner prescribed in § 1738. Lacking such attestation, the state court's plan was never proved or admitted in the federal court within the meaning of the Full Faith and Credit Act, and that Act therefore does not apply to mandate preclusion in subsequent judgments. See id.

Where a second judgment inconsistent with the first is reached, the second judgment prevails "whether the res judicata[22] effects of the first judgment were ignored by the parties or expressly rejected by the court in the second action." 18 Wright, Miller & Cooper, § 4404 at 26 (citing Restatement Second of Judgments § 15 (1981); Restatement Second of Conflict of Laws § 114 (1971); Ginsburg, Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, 82 Harv. L. Rev. 798 (1969); Balbirer v. Austin, 790 F.2d 1524, 1528-29 (11th Cir. 1986); Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529-30 (9th Cir. 1985); American Postal Workers Union v. United States Postal Service, 736 F.2d 317, 319 (6th Cir. 1984)) (footnote added). Where, as here, preclusion was never properly raised, giving effect to the second judgment is justified by appellants' failure to argue preclusion in the second proceeding. See id. at 26-27. Preclusion is an affirmative defense that is lost when not asserted. See id. at 26.

Appellants in reply will likely contend that the state court's legislative redistricting plan was presented to the federal court in

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[22] As used by commentators, the term "res judicata" collectively refers to both "claim preclusion" and "issue preclusion." See 18 Wright, Miller & Cooper, § 4402 at 6-7; see also Marrese, 470 U.S. at 376 n.1 (discussing this Court's use of the terms "claim preclusion" and "issue preclusion").

the form of a January 1992 motion asking the federal court to reconsider a previously-denied motion to stay. However, that motion did not offer the state court's legislative plan in the manner required under the Full Faith and Credit, and the state court's plan was at that time not reduced to a judgment in any event, and appellants are therefore not entitled to the benefits of that Act.

2. The State Court's Legislative Redistricting Plan Was Not Preclusive Under Minnesota Law.

Even if presented properly to the federal court under the Full Faith and Credit Act, the state court's legislative redistricting plan was not entitled to preclusive effect under Minnesota law. Full faith and credit preclusion is governed by state law. See 28 U.S.C. § 1738; Marrese, 470 U.S. at 380. In Minnesota, application of issue preclusion is appropriate where the issue was identical to one in a prior adjudication, there was a final judgment on the merits, the estopped party was a party or in privity with a party to the prior adjudication, and the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. See Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). The state court's legislative redistricting plan is not entitled to issue preclusive effect under these requirements.

First, the issues in the federal proceeding were not identical with the ones involved in the state action. As the federal court recognized, the federal action involved Voting Rights Act claims and challenges to Chapter 246 that were not raised by the pleadings in the state action. See Order of Stay, A-144-145. The first Ellis factor is not met.

Second, appellants argue that there was sufficient identity between the state and federal parties because of similar legal

representation, and they cite in support of that position a Supreme Court decision apparently applying federal common law to define "privity" for issue preclusion purposes. See Brief of Appellants at 26 (citing Montana v. United States, 440 U.S. 147, 154-55 (1979)). Nevertheless, in Minnesota, the appearance or "privity" with an appearing party that is necessary to apply issue preclusion is clearly either an actual adversarial appearance in litigation of one's own rights, see Margo-Kraft Distrib., Inc. v. Minneapolis Gas Company, 200 N.W.2d 45, 47 (Minn. 1972), or the exertion of sufficient control over the action in furtherance of one's own interests, even though not a party, such that the non-party has effectively had its day in court, see Denzer v. Frisch, 430 N.W.2d 471, 473 (Minn. Ct. App. 1988).

Mere representation of some parties by the same counsel does not constitute either an appearance or privity with an appearing party for issue preclusion purposes, particularly where the federal proceeding included parties (i.e., the Benson appellees) neither involved in the state proceeding nor represented by counsel who appeared there. The presence in the federal action of the Benson appellees, who had no control over or other connection with the state case, prevents application of issue determinations made in that case to issues arising in the federal action. Cf. Ellis, 319 N.W.2d at 704.

Appellants also ignore the fact that the federal and state parties whom appellants allege are in privity actually sought the adoption of different legislative redistricting plans in their respective actions. In light of that fact, and other differences noted above, appellants have failed to demonstrate that the third factor of the Ellis test is met in support of issue preclusion.

Finally, the Benson appellees had no "full and fair opportunity" to be heard on the adjudicated issues in the state

proceeding, because they did not appear in that proceeding. There was a consistent challenge to the state court's jurisdiction to adjudicate Voting Rights Act § 2 issues at all, let alone to provide a full and fair opportunity that would preclude parties not present in the state proceeding. See Cotlow v. Growe, MX 91-001562, Memorandum of Plaintiff-Intervenors Regarding Exclusive Federal Jurisdiction Over Voting Rights Act Claims (Minn. Spec. Redis. Panel, Oct. 7, 1991), SA-107-114. Therefore, appellants have also failed to meet the fourth factor of the Ellis test. The state court's plan is not entitled to issue preclusive effect because of all of these deficiencies.

D. The Claims Presented to the Federal Court Were Viable and Were Not Moot.

The central question in determining whether a claim is moot is "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." 13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, § 3533 at 212 (1984, supp. 1991); see also County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). "[T]he burden of demonstrating mootness is a heavy one." County of Los Angeles, 440 U.S. at 631 (quotation omitted).

Appellants did not raise the issue of mootness at any time prior to this appeal, but they contend here that the federal court's legislative redistricting plan was invalid because appellees' claims regarding legislative redistricting were mooted. Specifically, appellants contend that the Emison appellees' challenge to Minnesota's 1982 legislative redistricting plan was mooted by

Chapter 246's repeal of that plan.[23] See Brief of Appellants at 28. Appellants further argue that the Benson appellees' claims, which challenged the legislative redistricting plans in Chapter 246, were made moot by the state court's eventual holding that Chapter 246 was unconstitutional. See id.

Appellants in their argument disregard the impact of the state court's recognition of Chapter 246's unconstitutionality. When Chapter 246 was declared unconstitutional by the state court on October 1, 1991, its provisions, including its repeal of the 1982 plans, were invalidated. The 1982 districts remained in effect, and the Emison appellees' claims were without question viable at that point.

In addition, both the Emison and Benson appellees sought affirmative relief from the federal court. The Emison appellees specifically requested that the federal court issue an appropriate legislative redistricting plan. See Emison Complaint, A-90-91; see also Benson Complaint, SA-75-76. No remedy sufficient to provide this relief was promulgated until the federal court issued its plan on February 19, 1992.

The state court's legislative redistricting plan did not afford complete relief to appellants, as it could not properly address Voting Rights Act claims pled only in the federal action, and because it was in fact found to perpetuate Voting Rights Act

[23]This argument is, at best, inconsistent. Appellants maintain that the Emison appellees' claims challenging the 1982 legislative districts were mooted by the enactment of Chapter 246, yet they fail to apply the same analysis to their own claims in the state action, which also challenged only the 1982 districts. See Cotlow Complaint, A-175-181, A-185-187.

violations in Minnesota election districts.[24] Until the relief sought by the Emison and Benson appellees was granted, therefore, their consolidated actions were not moot. Without complete relief for the injury, the injury still existed. Cf. 13A Wright, Miller & Cooper, § 3533.2 at 238-39 ("Decision remains appropriate [and case is not moot although some issues are resolved] if there is a reasonable prospect that the court may award additional relief.").

III. THE FEDERAL COURT PROPERLY ISSUED ITS CONGRESSIONAL REDISTRICTING PLAN.

The federal court was unquestionably in compliance with Germano when it issued a congressional redistricting plan to fill the void left by both the state legislative process and the state court. See Germano, 381 U.S. at 409-10 (federal court should act where state fails to adopt a valid redistricting plan in a timely manner). When the federal court promulgated its congressional redistricting plan on February 19, 1992, there was no other congressional plan available from either the legislative process or the state court, nor was there any expression of state policy that the

[24]The only true advisory opinion or determination of a moot point in these cases was the state court's holding on the Voting Rights Act, as that Act related to Chapter 246. The state court first declared Chapter 246 unconstitutional by order dated October 1, 1991. See Procedural Order No. 4, A-219-220. Despite this finding and the lack of any Voting Rights Act claims before the state court, that court subsequently analyzed the unconstitutional and therefore invalid law for Voting Rights Act violations, issuing a preliminary one-sentence holding on the Voting Rights Act on November 21, 1991, with the final order not issued until December 9, 1991, or entered until January 30, 1992. See Findings of Fact, Conclusions of Law, and Preliminary Order for Judgment on Legislative Redistricting, A-244; Findings of Fact, Conclusions of Law, and Order for Judgment on Legislative Redistricting, A-259; Order for Entry of Judgment, A-356. Given the October holding that found Chapter 246 to be invalid on state and federal constitutional grounds, the state court's delayed examination of Chapter 246 for statutory violations not alleged in that proceeding was wholly unnecessary.

federal court did not consider.

A. Senate File 1597 Was Neither State Policy Upon Which the Federal Court Should Have Based Its Congressional Redistricting Order Nor a Valid Congressional Redistricting Plan.

Senate File 1597, the legislature's sole attempt at congressional redistricting, was vetoed by the Governor immediately after its passage. See Emison, 782 F. Supp. at 433-34. It therefore cannot constitute state policy. See Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 197 (1972) (refusing to treat vetoed reapportionment plan as state policy). Senate File 1597 was accordingly not entitled to deference under Weiser, 412 U.S. 783. See id.; see also supra § II.B.2.b.

Appellants' reliance on Weiser in an attempt to support consideration of the vetoed congressional redistricting plan is misplaced. The plan from which state policy was discerned in Weiser had not been expressly rejected by the executive in the course of the redistricting process, and the plan had in fact been approved by the entire legislative process. See Weiser, 412 U.S. at 784. Cf. Beens, 406 U.S. at 197. Weiser therefore does not speak to the circumstances presented by Senate File 1597.

In arguing that the federal court should have based its congressional redistricting plan on Senate File 1597, appellants also ignore the fact that even the state court has held that Senate File 1597 is not entitled to consideration because it is not "state policy." See Procedural Order No. 7, A-445-446 n.1; see also Emison, 782 F. Supp. at 446-47 (rejecting Senate File 1597 as state policy).[25]

[25]Appellants also fail to mention that the state court continued to ignore Senate File 1597 when that court recently proposed a congressional redistricting plan, almost two months after the federal court's plan was ordered, precluding state court action. Cf. Emison, 782 F. Supp. at 446-48 with Final Order, ABA-3.

Appellants' argument on the congressional plan therefore wholly disregards the state court, whose actions they otherwise support.

Senate File 1597 was not state policy because it had been vetoed, and it was not a valid congressional redistricting plan for the same reason. See Smiley v. Holm, 285 U.S. 355, 373 (1932) (Minnesota redistricting process requires legislative and executive approval). Senate File 1597 was therefore neither state policy nor a valid redistricting plan from the legislative process to which the federal court was obligated to defer in fashioning a congressional redistricting plan.

B. The State Court's April 15, 1992, Congressional Redistricting Plan Was Precluded by the Federal Court's Earlier Issuance of a Valid Congressional Plan.

The state court's congressional redistricting plan was issued on April 15, 1992, almost two months after the federal court's plan was entered. When the federal court issued its plan, the state court's plan was therefore not even available for consideration. The state court in fact indicated that it would not issue a congressional plan, given the existence of the federal court's plan and professed concerns for expense and potential confusion. See Procedural Order No. 7, A-445-446.[26]

[26]The state court's issuance of a congressional redistricting plan after previously indicating that it would not do so has served only to unnecessarily complicate this case. In ordering its congressional redistricting plan, the state court indicated that it was presenting its plan because of this Court's noting of probable jurisdiction. See Final Order, ABA-4. However, the state court was admittedly aware of this appeal of the federal court's congressional plan at the time of the state court's earlier decision to refrain from proposing its own congressional redistricting plan. See Procedural Order No. 7, A-445.

The state court in its final order for a congressional redistricting plan also stated that publication of its plan would not "create undue confusion or exacerbate any difficulties of federal-state interaction." See Final Order, ABA-4.

Furthermore, the state court was collaterally estopped from issuing a congressional redistricting plan, because the federal court's plan had already resolved all congressional redistricting issues and had been raised as a preclusive judgment in the state court proceeding. See Memorandum of Law of Plaintiff-Intervenors In Support of Motion to Dismiss, SA-116-117. As discussed above, Minnesota courts have long held that preclusion operates to prevent re-litigation of an issue when (1) the issue before a court is identical to one in a prior adjudication, (2) there was a final judgment on the merits, (3) the party to be estopped appeared in the prior case or was in privity with a party appearing there, and (4) the party to be estopped was given a full and fair opportunity to be heard on the issue. See Ellis, 319 N.W.2d at 704; see also Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979) (applying identical factors to determine preclusive effect of federal judgment); see generally 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, §§ 4419-20, 4423, 4432, 4435, 4448 (discussing similar factors) (1981, supp. 1992).[27] The federal court's prior adjudication of congressional redistricting meets all of these requirements.

First, the federal panel addressed the exact issue of congressional redistricting that the state court later attempted to adjudicate. In doing so, the federal court had before it pleadings that sought the same relief sought by plaintiffs in the state court.

Publication of the plan, however, has had precisely that effect, as the arguments here indicate.

[27]The preclusive effect of a federal court's judgment is controlled by federal rules in some instances and state rules in others. When, as here, there is no difference in application of preclusion rules, no choice of law need be made. Cf. Oldham, 599 F.2d at 279 (no need to resolve issue of applicability of federal as opposed to state preclusion rules where estoppel is accomplished under both).

Thus, while the state court did not have before it all legislative redistricting claims that were alleged in the federal action, there were parallel allegations regarding congressional redistricting in both proceedings. Cf. Emison Complaint, A-77-82 with Cotlow Complaint, A-181-185.

Second, the federal court's plan of congressional redistricting was issued as a final judgment on February 19, 1992. See Emison, 782 F. Supp. at 446-48. That judgment is a valid judgment by a court of competent jurisdiction, and it is entitled to preclusive effect against any later attempted judgments by the state court. See Embry v. Palmer, 107 U.S. 3, 9-10 (1982); see also 18 Wright, Miller & Cooper, § 4468 at 648-49.

Third, the plaintiffs, defendants, and defendant-intervenors in the state case were all parties before the federal court when that court issued its order and plans. Indeed, plaintiffs Patricia Cotlow, et al.; defendant Hennepin County Attorney; and the legislature as defendant-intervenors all voluntarily chose to intervene in the proceedings before the federal court.

Finally, all appellants participated fully in both proceedings. Moreover, the federal court had before it precisely the same proposed congressional plans that were ultimately submitted to the state court.

The federal court's congressional redistricting plan was validly promulgated and was based on all discernible state policy. It was preclusive against the state court's later plan, and it should be given effect.

CONCLUSION

Appellants have failed to demonstrate that the federal court's findings of fact and application of law were clearly erroneous. The federal court was not required to defer to the state court, and it properly retained jurisdiction.

The federal court correctly determined that plans based on the unconstitutional provisions of Chapter 246 perpetuated Voting Rights Act violations. The federal court's legislative redistricting plan meets all constitutional and statutory requirements. Overturning it and allowing implementation of the state court's plan would create a precedent not only of allowing state courts to enforce Voting Rights Act § 2, but also would allow them to do so when no § 2 claims are presented in the pleadings before them.

The federal court's congressional redistricting plan was properly based on discernible state policy, and it precluded state court congressional redistricting. The federal court's congressional plan is valid and should be affirmed.

For the above stated reasons, the Emison appellees, the Benson appellees, and appellee Lundgren respectfully request that this Court affirm the federal court's order.

Dated: June 30, 1992

Respectfully submitted,

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STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C8-91-985

Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein and Theodore Suss, individually and on behalf of all Citizens of Minnesota similarly situated,	)	
Plaintiffs,	)	
and	)	
John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh,	)	AFFIDAVIT OF BRUCE D. WILLIS
Plaintiff-Intervenors,	)	
vs.	)	
Joan Growe, Secretary State of Minnesota; and Patrick H. O'Connor, Hennepin County Auditor, individually and on behalf of all Minnesota county chief election officers,	)	
Defendants,	)	
and	)	

The Seventy-seventh Minnesota)
State House of Representatives)
and the Seventy-seventh Minnesota)
State Senate,)
)
Defendant-Intervenors.)

BRUCE D. WILLIS, being first duly sworn, deposes and states that:

1. He is one of the attorneys for plaintiff-intervenors John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh in this matter.

2. On March 2, 1992, your affiant served on behalf of plaintiff-intervenors a Notice of Motion and Motion for Dismissal of Claims Regarding Congressional Redistricting, or in the Alternative, for Summary Judgment.

3. In its Procedural Order No. 8, dated March 10, 1992, this Panel scheduled a hearing on plaintiff-intervenors' motion for March 23, 1992.

4. On March 17, 1992, your affiant received a telephone call from Judge Lansing, one of the members of this Special Redistricting Panel, asking whether plaintiff-intervenors would agree to a proposed postponement of the March 23, 1992, hearing until more was known about the United States Supreme Court's reaction to the pending appeal of the order issued in the parallel federal action. It was agreed that your affiant would give Judge Lansing a response the following day.

5. On March 18, 1992, your affiant called Judge Lansing's chambers and left a message that plaintiff-intervenors agreed that the hearing could be postponed, as discussed the day before with Judge Lansing.

6. On March 18, 1992, this Panel issued an order postponing indefinitely the March 23, 1992, hearing.

7. At no time did plaintiff-intervenors withdraw motion, and at no time did plaintiff-intervenors agree that their motion should never be heard.

8. On April 15, 1992, this Panel issued a Final Order by which it announced its own plan of congressional redistricting, wholly ignoring plaintiff-intervenors' pending motion, dated March 2, 1992, and wholly failing to address the issues raised by that motion.

/s/
Bruce D. Willis

Subscribed and sworn to before
me this __ day of April 1992.

/s/
Notary Public

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C8-91-985

Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all Citizens of Minnesota similarly situated,	
Plaintiffs,	
and	
John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh,	PLAINTIFF-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR WITHDRAWAL OF FINAL ORDER AND GRANTING OF THE RELIEF REQUESTED IN PLAINTIFF-INTERVENORS' MOTION DATED MARCH 2, 1992
Plaintiff-Intervenors,	
vs.	
Joan Growe, Secretary State of Minnesota; and Patrick H. O'Connor, Hennepin County Auditor, individually and on behalf of all Minnesota county chief election officers,	
Defendants,	
and	

The Seventy-seventh Minnesota State House of Representatives and the Seventy-seventh Minnesota State Senate,	
Defendant-Intervenors.	

On March 2, 1992, plaintiff-intervenors filed with this Panel a motion pursuant to Rules 41.01(b) and 41.02(a) of the Minnesota Rules of Civil Procedure for an order dismissing all claims of plaintiffs regarding congressional redistricting, or, in the alternative, for an order of summary judgment as to such claims, pursuant to Rule 56, on the ground that the plan of congressional redistricting issued by the United States District Court in Emison, et al. v. Growe, et al., Civ. 4-91-202 (D. Minn., Feb. 19, 1992), constitutes a prior judgment for congressional redistricting for the state of Minnesota and that this Panel is therefore precluded under the principle of collateral estoppel from issuing a separate judgment regarding congressional redistricting.

In Procedural Order No. 8, dated March 10, 1992, this Panel scheduled a hearing for March 23, 1992, on plaintiff-intervenor's motion. On March 17, 1992, Judge Harriet Lansing, a member of this Panel, telephoned counsel for plaintiff-intervenors to ask if plaintiff-intervenors would agree to a proposed postponement of the March 23, 1992, hearing until more was known about the United States Supreme Court's reaction to the pending appeal of the order issued in the parallel federal action. It was agreed that counsel for plaintiff-intervenors would give Judge Lansing a response the following day. On March 18,

1992, counsel for plaintiff-intervenors called Judge Lansing's chambers and left a message that plaintiff-intervenors agreed that the hearing could be postponed, as discussed the day before with Judge Lansing. On March 18, 1992, this Panel issued an order postponing indefinitely the March 23, 1992, hearing. At no time did plaintiff-intervenors withdraw their motion, and at no time did plaintiff-intervenors agree that their motion should never be heard. See Willis Affidavit.

On April 15, 1992, this Panel issued sua sponte a Final Order by which it announced its own plan of congressional redistricting. In doing so, the Panel wholly ignored plaintiff-intervenors' pending motion and wholly failed to address any of the issues raised by that motion. As that motion makes clear, this Panel has no authority to issue and is precluded under the doctrine of collateral estoppel from issuing a separate judgment regarding congressional redistricting.

Plaintiff-intervenors request that this Panel grant the relief requested in their motion of March 2, 1992, regarding dismissal of claims regarding congressional redistricting, or in the alternative, for summary judgment on those claims and accordingly withdraw its Final Order and plan for congressional redistricting.

DISCUSSION

On February 19, 1992, the United States District Court for the District of Minnesota issued its final order in the matter of Emison, et al. v. Growe, et al., Civ. 4-91-202 (D. Minn.). That order, and the plans for congressional redistricting set forth therein, constitute a valid and enforceable judgment by a court of competent jurisdiction. Under the theory of issue preclusion, or collateral estoppel, as applied by Minnesota courts, this Panel and the parties are barred from further adjudication or relitigation of

any claims relating to plans of congressional redistricting. See generally, Memorandum of Law of Plaintiff-Intervenors in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment as to Congressional Plans, dated March 2, 1992 [cites omitted].

Plaintiff-intervenors fully set forth in their March 2, 1992, moving papers the basis for application of the doctrine of collateral estoppel and why this Panel lacks authority to issue any plan of congressional redistricting. The federal court judgment is a valid judgment regarding congressional districts.

In issuing its Final Order, the Panel has completely ignored the doctrine of collateral estoppel as specifically raised by plaintiff-intervenors' pending motion. The Panel's stated purpose in issuing a congressional plan was "to fulfill our charge of deciding this action on the merits and to allow a complete record on review." Final Order, at 4. However, by issuing its Final Order, this Panel has wholly failed to address the merits of a motion validly before it and has created a wholly incomplete record for review.

Not only has this Panel acted in error by issuing a plan of congressional redistricting in the face of the clear mandate of the doctrine of collateral estoppel, but also this Panel has acted in error by failing to address a motion that has been validly pending before it for six weeks and for which this Panel had scheduled a hearing that was postponed only as a result of contact by this Panel with counsel for plaintiff-intervenors.

On March 3, 1992, this Panel issued Procedural Order No. 7, in which it stated that: "the existence of one small court's review squarely raises the wisdom or the necessity of this panel proceeding farther." See Procedural Order No. 7, at 6. Nothing has occurred in the intervening time to change that assessment. If

anything, Justice Blackmun's review and denial of appellants' motion to stay with respect to the federal court's order for congressional redistricting in Emison v. Growe only confirms the validity of the federal court's order regarding its congressional plan and its injunction of state election officials from conducting congressional elections under any other plan. On March 3, 1992, this Panel stated:

> Because Minnesota election officials are enjoined from accepting filings or conducting elections except in accordance with that plan, we also decline to impose, at this time, an alternative plan. We are fully prepared to release a congressional plan if and when such a course of action becomes appropriate.

Procedural Order No. 7, at 7-8.

Nothing has occurred since March 3, 1992, to make the issuance of a congressional plan by this Panel appropriate. Nothing has occurred since March 3, 1992, to alter Minnesota law on collateral estoppel or to alter the merits of plaintiff-intervenors' motion before this Panel based on that doctrine.

CONCLUSION

Plaintiff-intervenors have pending before this Panel a valid motion for dismissal of all claims regarding congressional redistricting under Rules 41.01(b) and 41.02(a), or, in the alternative, for summary judgment as to those claims under Rule 56 of Minnesota Rules of Civil Procedure on the ground that the federal court's plan of congressional redistricting constitutes a valid prior judgment, and this Panel is therefore precluded under

the doctrine of collateral estoppel from issuing a separate judgment regarding congressional redistricting. In issuing its Final Order on April 15, 1992, this Panel wholly ignored that motion and its merits. Plaintiff-intervenors request that this Panel grant plaintiff-intervenors' motion that the Panel withdraw its Final Order and further that this Panel grant the relief requested by plaintiff-intervenors' in their motion of March 2, 1992.

Dated: April 17, 1992.

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.

By: /s/

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